No. 02-1536

Supreme Court, U.S.
FILED
MAY 23 2003
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

The BOROUGH OF TENAFLY, ANN MOSCOVITZ, individually and in her official capacity as Mayor of the Borough of Tenafly, CHARLES LIPSON, MARTHA KERGE, RICHARD WILSON, ARTHUR PECK, JOHN SULLIVAN, each individually and in their official capacities as Council Members of the Borough of Tenafly,

Petitioners,

v.

TENAFLY ERUV ASSOCIATION, INC., CHAIM BOOK, YOSIFA BOOK, STEFANIE DARDIK GOTLIEB and STEPHEN BRENNER,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF RESPONDENTS TENAFLY ERUV ASSOCIATION, INC. AND STEFANIE DARDIK GOTLIEB IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

23 pp

QUESTION PRESENTED

Whether the court of appeals correctly ordered the entry of a preliminary injunction where it found that petitioners violated respondents' First Amendment Free Exercise rights under *Employment Division* v. *Smith*, 494 U.S. 872 (1990) and *Church of the Lukumi Babalu Aye* v. *City of Hialeah*, 508 U.S. 520 (1993), in ordering the removal of plastic strips that constitute part of an eruv from certain telephone poles, thereby selectively applying a local ordinance which on its face prohibits affixing anything to telephone poles but which petitioners had permitted numerous others to violate by attaching things to the poles.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, there are no parent companies, subsidiaries or affiliates of Tenafly Eruv Association, Inc. that have issued shares to the public.

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Respondents Tenafly Eruv Association, Inc. ("TEAI") and Stefanie Dardik Gotlieb request that this Court deny the petition for certiorari. The petition should be denied because: (1) it seeks review of a nonfinal order; (2) it does not present an issue on which the circuits have issued conflicting decisions; (3) the court of appeals' decision in this case is

grounded in a factbound application of well-established law; and (4) this case would be an exceptionally poor vehicle because the proper resolution of this case does not require the conciliation of inconsistent statements among the circuits. The Third Circuit's nonfinal order: (1) reversed the district court's denial of a motion for preliminary injunction, and (2) remanded the case back to the district court with directions to issue the preliminary injunction. In so doing, the court of appeals held that petitioners' "selective discretionary application" of a local ordinance when it ordered the removal of plastic strips affixed to telephone poles by a group of Orthodox Jews that constituted part of an eruv, violated well-established First Amendment principles of nondiscrimination enunciated by this Court in *Employment Division* v. *Smith*, 494 U.S. 872 (1990) and *Church of the Lukumi Babalu Aye* v. *City of Hialeah*, 508 U.S. 520 (1993).

COUNTERSTATEMENT OF THE CASE

The court of appeals correctly directed the district court to enter the preliminary injunction and, in doing so, correctly relied upon and applied *Smith* and *Church of the Lukumi*, under which a government actor violates the First Amendment if it chooses to enforce even a neutral law selectively against a religious group. The specific factual record in this case reveals that petitioners selectively enforced an ordinance governing use of the telephone poles in the public right of way against a group of Orthodox Jews when they ordered respondent TEAI to remove plastic strips from telephone poles after they had previously permitted numerous other groups to attach things to the poles or otherwise place things in the public right of way.

Background of the Litigation

The eruv, a ritual boundary within which Orthodox Jews may carry things as well as push wheelchairs and strollers on

the Sabbath, had been established in September, 2000. It consisted of existing horizontal telephone wires and plastic strips, known as "lechis," which were attached to certain of the telephone poles. The lechis are identical to the strips used by Verizon to cover ground wires. Pet. App. at 4a.

At that time, neither the TEAI nor the members of the Borough Council believed that a Borough ordinance governed or that Borough approval was necessary for the placement of the lechis. Indeed, in November, 2000, the attorney for the TEAI wrote a letter to the Borough attorney which stated, in part: "I also appreciate your advice that the Borough has no specific ordinance covering this matter or any particular format for the Eruv Association to follow in submitting its request . . ." Pet. App. at 8a. And, as late as the meeting on December 12, 2000, at which the Borough Council voted to require that the eruv be taken down, one member of the council stated: "To the best of my knowledge—and this can be confirmed,—there is no ordinance, no resolution that says that you cannot hang something from a utility pole, to the best of my knowledge, and please correct me if I'm wrong, there's no ordinance." Pet. App. at 8a-9a; Joint Appendix ("JA") at A313.[1] At that point, for the first time, the Mayor referred to Ordinance 691 but, even then, there was no suggestion that the ordinance absolutely prohibited affixing the lechis to the poles. Pet. App. at 9a. In fact, the Council permitted TEAI to file its request to leave the eruv in place, considered the request in several closed and open public meetings, and in their discretion voted to deny it.

Nor was there any suggestion that in voting to approve the eruv, the Borough Council would be violating the Establishment Clause of the First Amendment. To the

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[1] The Joint Appendix was submitted by Petitioners and Respondents to the Third Circuit in connection with the appeal of the district court's decision.

contrary, the Borough Attorney publicly stated at the meeting of December 12, 2000, that he had advised the Council that, pursuant to a prior decision of the United States District Court for the District of New Jersey directly on point, approval of the eruv would not be a violation of the Establishment Clause. JA at A308-09.

Prior to voting to require that the eruv be removed, the Borough Council had either authorized or permitted the use of the poles, or the Borough right of way, which is also governed by Ordinance 691, for a variety of religious and secular purposes. Each year, the local Chamber of Commerce is permitted to put holiday decorations on the poles. Pet. App. at 3a. Opponents of a school regionalization plan were permitted to place orange ribbons on the poles. *Id.* A private company was allowed to affix radio transmitters to the poles. JA at A344-58, A426. Residents were permitted to post house numbers, garage sale signs and lost dog signs on the poles. Other uses of the Borough right of way were routinely permitted: residents could symbolically "rent" for $1 the curbstones and sidewalk for sprinklers, wells and fences. Pet. App. at 3a. In addition, churches had been authorized to put directional signs in the right of way, some of which have religious symbols and times of worship. *Id.* There is no evidence that the Borough Council had ever denied an application under Ordinance 691. In addition, the Borough has permitted the display of a creche and a menorah in a public park, sponsored an afternoon with Santa in Borough Hall and an Easter Egg hunt on the lawn of Borough Hall, and permitted a Good Friday march through the streets of the Borough. JA at A425, A432-33, A435-36, A444-45, A871.

Course of Proceedings and Disposition Below

This lawsuit was commenced after the Borough Council voted to require that the eruv be removed. The district court granted respondents' application for a temporary restraining

order but, after a hearing, denied the motion for a preliminary injunction. Pet. App. at 9a-10a. The district court's denial was based, inter alia, on the ground that Ordinance 691 was clear on its face and prohibited placing anything on the poles. Pet. App. at 11a, 142a. The district court also found that the Borough's desire to avoid violating the Establishment Clause was a "compelling state interest" that justified the Council's action. Pet. App. at 148a-156a, 166a.

The Third Circuit unanimously reversed and directed the entry of the preliminary injunction. Pet. App. at 59a. The Borough's petition for rehearing or rehearing en banc was denied. Pet. App. at 173a-174a. The court, observing that "the Borough has allowed private citizens to affix various materials to its utility poles," Pet. App at 36a, held that:

> the Borough's selective, discretionary application of Ordinance 691 against the lechis violates the neutrality principle of *Lukumi* and *Fraternal Order of Police* [v. *City of Newark*, 170 F.3d 359 (3d Cir.), *cert. denied*, 528 U.S. 817 (1999),] because it "devalues" Orthodox Jewish reasons for posting items on utility poles by "judging them to be of lesser import than non religious reasons," and thus "singles out" the plaintiffs' religiously motivated conduct for discriminatory treatment, *Lukumi*, 508 U.S. at 537; *Fraternal Order of Police*, 170 F. 3d at 364-365. Pet. App. at 37a.

With respect to the Establishment Clause rationale adopted by the district court, the court of appeals exhaustively analyzed this Court's Establishment Clause rulings and held that action of the Borough Council approving the eruv would not have violated the Establishment Clause and, afterthought or not, concern of such a violation could not, therefore, have been a "compelling state interest." Pet. App. at 46a-57a. The court based its conclusion in this regard on the unique facts of this case. Pet. App. at 54a-55a.

REASONS TO DENY THE WRIT

I. THE DECISION BELOW IS NOT A FINAL JUDGMENT

The petition for a writ of certiorari should be denied because the ruling below is a nonfinal order that resolved only the question whether a preliminary injunction should issue. Except in "extraordinary cases, the writ is not issued until final decree." *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); *Virginia Military Institute* v. *United States*, 508 U.S. 946 (1993) (Scalia, J., concurring). This case is not so "extraordinary" or of such public importance to warrant deviation from this Court's normal appellate practice. Rather, this case is a straightforward application of Supreme Court precedent interpreting the Free Exercise clause to the specific facts of this case.

II. THERE IS NO SPLIT IN THE CIRCUITS OVER A "SYSTEM OF INDIVIDUAL EXEMPTIONS" AND THIS CASE DOES NOT RAISE AN "INDIVIDUAL EXEMPTIONS" ISSUE

Contrary to petitioners' assertions, the Third Circuit's factually driven decision is a logical, straight-forward and faithful application of the legal principles articulated in *Smith* and *Church of the Lukumi* and, as such, does not warrant Supreme Court review. In an attempt to convince this Court that there are "special and important reasons" warranting certiorari, petitioners have manufactured a non-existent dispute among the circuit courts concerning the interpretation of a phrase embedded in the *Smith* decision—"system of independent exemptions"—and then tried to portray the Third Circuit's decision as a radical interpretation of this phrase. This argument is nothing more than a straw man erected by petitioners that has no relevance to the Third Circuit's decision.

In *Smith*, this Court determined that the Free Exercise Clause is not implicated, and strict scrutiny is not appropriate, where the statute or law in question is "neutral," "generally applicable," and only burdens religion incidentally. 494 U.S. at 879. In reaching this decision, the Court acknowledged that in three previous unemployment compensation cases it had held that strict scrutiny was appropriate because the state had in place a system of individual exemptions that accommodated secular hardships but not "religious hardship." *Id.* at 884. Three years later, in *Church of the Lukumi*, this Court determined that it was appropriate to apply strict scrutiny to the four ordinances in question because it was clear that these ordinances were neither "neutral" nor "generally applicable" but instead "gerrymandered" to only target and affect the Santeria religion. *Church of the Lukumi*, 508 U.S. at 534-545. In determining that animal slaughter ordinances were neither "neutral" nor "generally applicable," the Court looked not only at the text of the ordinances, but also at their application, stating that "apart from the text, the effect of a law in its real operation is strong evidence of its object." *Id.* at 535. Having analyzed how these ordinances were applied, the Court determined that "religious practice [was] being singled out for discriminatory treatment" and strict scrutiny was required in part because the ordinances "require[d] an evaluation of the particular justification for the killing [and] represents a system of individualized governmental assessment of the reasons for the relevant conduct. . . [and] respondent's application of the ordinance's test of necessity devalues religious reasons for killing by judging them to be of lesser import than nonreligious reasons." *Id.* at 537. Neither the *Smith* nor *Church of the Lukumi* decisions were based upon the presence of "a system of individual exemptions" or a "system of individualized governmental assessments," and neither purported to create an absolute rule or test that must be satisfied in order to sustain a cause of action brought under the Free Exercise Clause.

Since this Court decided *Church of the Lukumi*, there has been no confusion, disagreement or split among the courts of appeals concerning what constitutes a "system of individual exemptions," or even "a system of individualized governmental assessments." Neither the Third Circuit nor any of the numerous courts whose decisions are cited by petitioners in support of their contention that there is widespread disagreement even mention, let alone recognize or consider, any confusion, disagreement or split. Pet. at 10-18. In fact, in many cases cited by petitioners, including the Third Circuit's opinion in this case, the court does not mention the phrase "system of individual exemptions" or consider whether such a system exists.

Furthermore, an analysis of the law proves that petitioners' theories concerning a "system of individual exemptions" are erroneous, unsubstantiated and arbitrary. Petitioners first claim that "several courts have held that a system of individual exemptions exists only where a statute confers discretion on a governmental official or officials to make a case-specific determination under the general terms of the law." Pet. at 12. However, not one of the four cases cited supports this position. Each of these cases simply concludes that the laws in question were not "neutral" or "generally applicable" because they were enforced in a discretionary manner either due to the explicit language of the law or how that law had been interpreted by government officials to the disadvantage of religious interests or parties. *First Covenant Church of Seattle* v. *City of Seattle*, 840 P.2d 174 (Wash. 1992); *Korean Buddhist Dae Won Sa Temple of Hawaii* v. *Sullivan*, 953 P.2d 1315 (Haw. 1998); *Keeler* v. *Mayor and City Council of Cumberland*, 940 F. Supp. 879 (D. Md. 1996); *Rader* v. *Johnston*, 924 F. Supp. 1540 (D. Neb. 1996). Not one of these cases attempts to determine, let alone declare, in what other instances a "system of individual exemptions" may exist.

Petitioners also cite cases from the Second, Fifth and Sixth Circuits as support for the proposition that certain courts specifically reject the view that "a system of individual exemptions exists only where a statute confers discretion on a governmental official or officials to make a case specific determination under the general terms of the law." These cases also fail to provide any persuasive support for petitioner's contentions. Both the Second Circuit case—*Rector of St. Bartholomew's Church* v. *City of New York*, 914 F.2d 348 (CA2 1990), *cert. denied*, 499 U.S. 905 (1991)—and the Sixth Circuit case—*Vandiver* v. *Hardin County Bd. of Educ.*, 925 F.2d 927 (CA6 1991)—were decided before *Church of the Lukumi* and therefore are of little value in determining whether, and how, courts should consider and determine what constitutes a "system of individual exemptions." The Fifth Circuit case—*Daniels* v. *City of Arlington, Texas*, 246 F.3d 500 (CA5), *cert. denied*, 534 U.S. 951 (2001)—was decided after *Church of the Lukumi*, but does not even mention the phrase "system of individual exemptions" and attempts no analysis as to whether the statute in question was "neutral" and "generally applicable."

Petitioners next claim that the Third Circuit's decision in *Fraternal Order of Police Newark Lodge No.12* v. *City of Newark*, 170 F.3d 359 (CA3) ("*FOP*"), *cert. denied*, 528 U.S. 817 (1999), stands for the proposition that "a system of individual exemptions exists where the law itself distinguishes between different categories of acts," and assert that the Eighth, Ninth, and Tenth Circuits have all rejected this view. Petitioners are wrong on both accounts.

In *FOP*, two devout Sunni Muslim police officers challenged their police department's no-beard policy, which allowed undercover police officers and police officers with medical conditions to grow beards but prevented the plaintiffs from maintaining the beards they had grown in accordance with their religious beliefs. 170 F.3d at 365. Contrary to

petitioners' assertions, the Third Circuit did not determine that strict scrutiny was appropriate simply because the no-beard regulation provided in its terms for an exemption for non-religious reasons. Instead, the Third Circuit concluded that strict scrutiny was appropriate because the department's creation of an exception for secularly motivated conduct coupled with its *specific refusal* to create an exception for religiously motivated conduct was an indication that this regulation was not "neutral" and "is sufficiently suggestive of discriminatory intent so as to trigger heightened scrutiny under *Smith* and *Lukumi*." *Id.* The Third Circuit indicated that *Smith* and *Church of the Lukumi* did not require, or call for, an examination into whether a "system of individual exemptions" existed, but rather a determination of whether the law or regulation in question enables, or is used by, the government to decide that secular practices are more important than, and favored over, religious practices. *Id.*

Nor do the cases cited by petitioners conflict with *FOP*. First, both the Eighth Circuit case—*Cornerstone Bible Church* v. *City of Hastings*, 948 F.2d 464 (CA8 1991)—and the Ninth Circuit case—*American Friends Service Comm. Corp.* v. *Thornburgh*, 951 F.2d 957 (CA9 1991)—were decided prior to *Church of the Lukumi* and therefore are of little value. Second, in the Tenth Circuit case—*Swanson* v. *Guthrie Independent School District No. 1-L*, 135 F.3d 694 (CA10 1998)—the court specifically refused to consider whether the regulation in question was neutral and generally applicable because the issue had not been raised below. *Id.* at 698. Because these are the very questions at issue here, *Swanson* is of no relevance to this case.

Finally, petitioners' hyperbolic claims that the Third Circuit's "radical" decision represents the "most extreme position" ever taken and "eviscerates *Smith's* touchstones of neutrality and general applicability" ignore the fact that this decision is a straightforward application of the principles of

Smith and *Church of the Lukumi*. After determining that Ordinance 691 was neutral and generally applicable on its face, the Third Circuit examined whether this ordinance had been uniformly applied, as *Church of the Lukumi* instructs. The Third Circuit, based on facts developed below, determined that petitioners had failed to enforce Ordinance 691—having authorized or allowed various secular and religious conduct to occur in contravention of the terms of the ordinance—but then applied Ordinance 691 to bar respondents' religiously motivated conduct. While petitioners contend that this determination was based on "isolated instances of non-uniform conduct," both the record and the Third Circuit's extremely thorough opinion reflect that this decision was based on numerous examples of non-enforcement of Ordinance 691, as indicated by the court of appeals' characterization of Ordinance 691 as "often dormant." Pet. App. at 37a.

The crux of the Third Circuit's decision is that Ordinance 691 was not neutral and generally applicable due to the selective manner in which the prohibition of the Ordinance was enforced. The Third Circuit's decision to apply strict scrutiny, in light of these findings, properly applies *Smith* and *Church of the Lukumi*, and there is no basis to grant the petition.

III. THERE IS NO SPLIT IN THE CIRCUITS CONCERNING THE PROPOSITION THAT GOVERNMENT ACTION THAT DISCRIMINATES AGAINST RELIGIOUS CONDUCT IS UNCONSTITUTIONAL REGARDLESS OF WHETHER IT IMPOSES A SUBSTANTIAL BURDEN ON SUCH CONDUCT

Petitioners contend that there is a conflict among the courts of appeals over the Third Circuit's determination that "[u]nder *Smith* and Lukumi . . . there is no substantial burden

requirement when government discriminates against religious conduct." Pet. App. at 41a. This is simply not accurate. As the Third Circuit correctly noted, where the government discriminates against religious conduct, *Smith* and *Church of the Lukumi* unequivocally state that courts are to refrain from evaluating the extent that government actions impose a burden on the religious conduct. *See Smith*, 464 U.S. at 887 & n.4; *Church of Lukumi*, 508 U.S. at 53; *see also Good News Club* v. *Milford Central School*, 533 U.S. 98 (2001) (discrimination against religious conduct is constitutionally prohibited even without proof that religious observance has been "substantially burdened.").

This Court stated in *Smith*:

> It is no more appropriate for judges to determine the "centrality" of religious beliefs before applying a "compelling interest" test in the free exercise field, than it would be for them to determine the "importance" of ideas before applying the "compelling interest" test in the free speech field. What principle of law or logic can be brought to bear to contradict a believer's assertion that a particular act is "central" to his personal faith? Judging the centrality of different religious practices is akin to the unacceptable "business of evaluating the relative merits of differing religious claims." As we reaffirmed only last Term, "[i]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds." Repeatedly and in many different contexts, we have warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim . . . [To require otherwise would mean that] courts would constantly be in the business of determining whether the "severe impact" of various laws on religious practice (to use Justice Blackmun's terminology, post, at 919) or the "constitutiona[l] significan[ce]" of the "burden on the specific plaintiffs" (to use Justice O'Connor's

> terminology, post at 899) suffices to permit us to confer [a religious] exemption. It is . . . horrible to contemplate that federal judges will regularly balance against the importance of general laws the significance of religious practice.

494 U.S. at 887-89 (internal citations omitted); *see Church of the Lukumi*, 508 U.S. at 531-32 (a law that is not neutral or generally applicable must be justified by a compelling government interest and must be tailored to advance that interest; no mention, discussion or analysis of substantial burden). The court of appeals applied this precept in a straightforward manner to the facts of this case.

While the court of appeals set out a purported conflict among the circuits at footnote 31 of its opinion, Pet. App. at 42a, respondents respectfully submit that these cases are not inconsistent with the Third Circuit's opinion in this case. These cases comport with the notion that substantial burden analysis should be employed when government action incidentally impinges on religious conduct, and such analysis is not necessary if it is determined that the government action specifically targets and/or discriminates against religious conduct. Under the facts of this case, the court of appeals was correct in concluding that petitioners specifically targeted and discriminated against Orthodox Jews.

Finally even if there is a requirement that "substantial burden" has to be shown, it is undisputed that without the eruv "Orthodox Jews who have small children or are disabled typically cannot attend synagogue on the Sabbath." Pet. App. at 4a. This undoubtedly satisfies the substantial burden standard. Indeed, even the district court recognized that for observant Jews, the eruv "significantly enhances the practice of their religion." Pet. App. at 70a.

IV. THERE IS NO SPLIT IN THE CIRCUITS ON WHETHER PERMITTING AN ERUV VIOLATES THE ESTABLISHMENT CLAUSE, AND THERE IS NOTHING IN THE RECORD TO SUPPORT PETITIONERS' CLAIM THAT VIOLATING THE ESTABLISHMENT CLAUSE WAS EVER A CONCERN, LET ALONE A VALID CONCERN

Petitioners' final claim is that this case raises the issue of whether a potential Establishment Clause violation is a compelling interest that justifies a municipality's selective restrictions on a religious group. Prior to the district court's decision, however, petitioners *never* claimed that permitting the eruv would be a violation of the Establishment Clause. Quite to the contrary, the Borough Attorney publicly stated at the meeting of December 12, 2000, at which the Council voted to remove the eruv, that he had advised the Council that, pursuant to the decision of the District Court for the District of New Jersey in *ACLU of New Jersey* v. *City of Long Branch*, 670 F. Supp. 1293 (D.N.J. 1987), approval of the eruv would not be a violation of the Establishment Clause. JA at A308-09. And, it was undisputed by the parties in the district court that a local government does not violate the Establishment Clause when it permits Orthodox Jews to maintain an eruv at no public expense. *City of Long Branch; see also Smith* v. *Community Bd. No. 14*, 491 N.Y.S.2d 584 (N.Y. Sup. Ct. 1985), *aff'd*, 518 N.Y.S.2d 356 (2d Dep't 1987); Pet. App. 124a. Only amicus American Civil Liberties Union-New Jersey raised this issue in the District Court. No case has held to the contrary.[2]

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[2] Moreover, this Court has suggested that a subjective fear of Establishment Clause violations is not sufficient to overcome First Amendment rights exercised on public property. *See e.g.*, *Rosenberger* v. *Rector and Visitors of University of Virginia*, 515 U.S. 819, 839-46 (1995); *Lamb's Chapel* v. *Center Moriches Union Free School District*, 508 U.S. 384,

Finally, Petitioners' contention that the court of appeals analyzed this issue under the wrong test is incorrect. The court of appeals did not "dismiss the three-part test of *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971)." Pet. at 7. While the court of appeals primarily analyzed this claim under the "endorsement test," Pet. App. at 50a-57a, the court also analyzed each of the three prongs of the *Lemon* test and concluded that "[t]o the extent that the *Lemon* test retains some trace of vitality . . . it does not support the Borough's Establishment Clause defense." Pet. App. at 57a, n.41. And, the Third Circuit's analysis was driven by the unique facts of this case—that the Borough had permitted or sponsored a wide variety of religious uses of public property—church signs on the right of way, a creche in a public park, a Good Friday march, Santa Claus in Borough Hall, and an Easter egg hunt outside Borough Hall. JA at A425, A432-36, A444-45, A748, A871, A975-79.

394-95 (1993); *cf. also Good News Club* v. *Milford Central School*, 533 U.S. 98 (2001) (it is not at all "clear whether a state's interest in avoiding an Establishment Clause violation would justify viewpoint discrimination").

CONCLUSION

For the reasons set forth above, the petition for writ of certiorari should be denied.

Respectfully submitted,

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May 23, 2003